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THE RIGHTS OF CREDITORS OF A MUNICIPAL CORPORATION WHEN THE STATE HAS PASSED A LAW TO ABOLISH OR ALTER IT.

An examination of the cases involving the question indicated above discloses an apparent conflict between the absolute power which is supposed to reside in the legislature of a state to alter or abolish at will the municipal corporations which it has created, and, the guarantee of the Federal Constitution[1] that "No state shall pass any law impairing the obligation of contracts," as it affects the rights of creditors of such corporations altered or abolished. In considering the subject in its various branches we must necessarily determine whether the apparent conflict is real, and, if so, which principle prevails. For the sake of convenience and good order, the cases will be considered under three divisions:

I. Where One or More New Corporations Are Created in Place of the Old.

There have been many cases adjudicated which fall under this head; and, as the decisions of the courts have been eminently consistent and clearly in accord with reason, it will be well to examine them carefully, as the principles laid down in deciding them will enable us better to analyze and discuss the more difficult cases to be considered further on.

In the leading case of Mobile *v.* Watson;[2] it appeared that on February 11, 1879, the legislature of Alabama, with the purpose of aiding the City of Mobile, then heavily in debt, abolished it and created in its place a new municipality, called the Port of Mobile. The bounds of the new municipality were not identical with those of the old, but out of more than $16,000,000 of taxable property of the City of Mobile, all but $900,000 was included within the limits of the Port of Mobile, and fourteen-fifteenths of the inhabitants of the City of Mobile were inhabitants of the

1. Art. 1, § 10.
2. 116 U. S. 289.

Port of Mobile. Suit was brought against the new corporation by a holder of bonds issued by the old. The two questions, whether the debts of the old corporation fell upon the new as its legal successor, and whether powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survived and passed into the new corporation, were answered in the affirmative, and judgment was awarded and a writ of mandamus issued against the proper city officers.

In the course of the opinion the court quoted with approval the language of Mr. Justice Field, in delivering judgment, in the case of Broughton *v.* Pensacola,[3] that when "a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in the new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and in the absence of express provision for their payment otherwise, it will also be presumed in such a case that the legislature intended that the liabilities as well as the rights of property of the corporation in the old form should accompany the corporation in its reorganization."

Further on the Court used the following clear and forceful language:[4]

> "The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the states, for the convenient administration of their affairs, and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals.[5]

3. 93 U. S. 266-270.

4. Ibid, at p. 304.

5. Citing Broughton *v.* Pensacola, 93 U. S. 266; Mt. Pleasant *v.* Beckwith, 100 U. S. 514.

"Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the constitution of the United States and is null and void.[6]

"It follows that the contract by which, under authority of the legislature, the City of Mobile agreed to levy a special tax for the payment of the principal and interest of the class of bonds to which those held by the plaintiff belong is still in force, and its obligation rests upon its legal successor, the Port of Mobile.

"All laws passed since the making of the contract, whose purpose or effect is to take from the City of Mobile, or its successor, the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded."

A case similar, in effect, to the preceding is Mt. Pleasant *v.* Beckwith.[7] Here it was held, that "where a municipal corporation is legislated out of existence and its territory annexed to other corporations, the latter, unless the legislature otherwise provides, becomes entitled to all its property and immunities, and severally liable for a proportionate share of all its then subsisting legal debts, and vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing thereon."

We may observe, in passing, what Mr. Justice Clifford, in delivering the opinion of the court, has to say as to the relative force of the supposedly conflicting rules of law to which attention was called at the outset, namely, the sovereign power of the state legislature over municipalities, and the constitutional rights of creditors of such municipalities:

"State control over the division of the territory of the State into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme but it cannot

6. Citing Von Hoffman *v.* Quincy, 4 Wall. 535; Edwards *v.* Kearzey, 96 U. S. 595; Ralk County Ct. *v.* U. S., 105 U. S. 733, etc.

7. 100 U. S. 514, 533.

be exercised to annul another regulation of the constitution.[8]

"Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts.[9]

"Text writers concede almost unlimited power to the state legislatures in respect to the division of towns and the alterations of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the right of creditors nor impair the obligations of a valid contract.[10]

"Concessions of power to municipal corporations are of high importance; but they are not contracts, and consequently are subject to legislative control without limitation, unless the legislature oversteps the limits of the constitution."[11]

In the foregoing case the towns which were held liable for the debts of the abolished town, were already in existence when the law was passed which abolished the old town and distributed its property among them. The same rule as to apportionment of liability would logically be applied in case the old town should be abolished and, by the same or a later law, new towns should be created out of its former territory and population.

An interesting question arises in cases where a period of time elapses between the passage of the law abolishing the old and that creating the new municipality, no provision being made in the former law for the payment of debts of the abolished municipality. Was the first law originally unconstitutional, and was its unconstitutionality cured by the passage of the later? If it was not unconstitutional, but valid, what became of the legal rights of creditors during the interval—were they annulled and later revived by the passage of the second law, or did they continue to exist *in nubibus,* so to speak?[12] Again, what is the

8. Citing Chandler *v.* Boston, 112 Mass. 200, 6 Cush. 580.

9. Citing The Western Saving Fund Society *v.* The City of Philadelphia, 31 Pa. St. 175, 185.

10. Citing 1 Dillon, Municipal Corporation, § 128; Blanchard *v.* Bissell, 11 Ohio St. 96; Lansing *v.* Co. Treasurer, 1 Dill. 522, 528.

11. Citing Layton *v.* New Orleans, 12 La. Ann. 515.

12. See Bradford *v.* Fayetteville (N. C.), 32 S. E. 804.

relation between the old and new corporations; is the new a continuation of the old, under a different name and system, or is it a successor?

The courts have sometimes half jestingly adverted to the matter, and in one or two cases explained the change by the theory of metempsychosis, but as a rule they have evaded these technical difficulties, and satisfied themselves with administering practical justice, on broad lines. They have been kept in the right path by holding in mind the real nature of a municipal corporation, considering the essential elements to be territory and population, and treating the particular form given by the legislature, as, in a sense, merely the "guinea stamp."[13]

In O'Connor *v.* City of Memphis,[14] Cooper, J., delivering the opinion of the court, said:

> "Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these things combined, will destroy the identity, continuity or succession of the corporation, if the people and territory reincorporated constituted an integral part of the corporation abolished. The reason is to be found in the peculiar nature of such corporations. A charter for municipal purposes is an investing of the people of a place with the local government thereof, constituting an *imperium in imperio,* and the corporators and the territory are the essential elements, all else being mere incidents or forms.[15] And precisely as a change in the form of government, or even the conquest of a state will not

13. Thus in State *v.* Natal (39 La. Ann. 439), the court said: "The city of New Orleans, founded by Bienville about 1718, has never ceased to exist as an agglomeration of human beings for social, commercial, and industrial purposes. In 1805 those inhabitants were given a charter, for the first time since the cession of 1803, and that charter has been altered and amended some way or other, in subsequent years, viz.: 1812, 1818, 1833, 1835, 1837, 1846, 1850, 1852, 1870, and 1882; but the city, the existence of which was generally recognized by the various constitutions, has retained its identity, not only as a matter of fact, but also as a matter of legal necessity."

14. 6 Lea (Tenn.) 730, 735.

15. Citing Cuddon *v.* Eastwick, 1 Salk. 192; Luehrman *v.* Taxing Dist., 2 Lea 425; People *v.* Morris, 13 Wend. 325; People *v.* Hurlbut, 24 Mich. 44, 88; New Orleans R. Co, *v.* City of New Orleans, 26 La. Ann. 476.

affect its rights or liabilities, whatever may be the incidental modifications, so neither will a change of the lesser empire. The property held by such a corporation for public use cannot be subjected to the claims of creditors, and is only held by it as trustee. The only means of [at] its disposal for the payment of debt consist, ordinarily, of the taxes which it is authorized to raise from the persons, property and business within its territorial limits. The persons and property, or, as said above, the corporators and the territory are the essential constituents of the corporation, and rights and liabilities naturally adhere to them."

From the cases considered and briefly reviewed, we adduce the following rules as well-established law:

First. A municipal corporation has two phases—one public and the other private. As to the first it is a political division of the government of a state, established for the local governing of that part of the population comprised within certain territorial limits; as to the second, it is an aggregation of individuals united, for mutual benefit, in the form of a corporation and having the power, among others, to bind itself through the proper officers, by contract.

Second. Considering a corporation in its political phase only, the state legislature has the power to alter or abolish it, but,

Third. In so doing, adequate provision must be made for the payment of subsisting debts, which the corporation has contracted in its capacity of business concern.[16]

Fourth. The essential elements of a municipal corporation, existing back of its particular political form, are population and property. Therefore,

Fifth. Where no adequate provision is made for the payment of the debts of the annulled corporation, a municipality succeeding to the whole or a part of its population and territory will be considered by the courts as its legal successor, liable for its subsisting debts, in proportion to the amount of property taken over, and endowed with the same power of taxation which the original municipality possessed and on the strength of which the debts were contracted, any legislative prohibition to the contrary being void.

16. "Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place." (Mt. Pleasant *v.* Beckwith, supra, p. 534.)

II. Where a Municipal Corporation Is Abolished by Act of the Legislature and Its Territory and Inhabitants Remanded to the Government of the State, No Adequate Provision Being Made for the Payment of Creditors of the Defunct Municipality.

It is apparent that the kind of legislation described here is, in effect, an attempt on the part of the state government to nullify the debts of a municipality. This is not a mere academic question; such legislation has been enacted in the past, and probably will be in the future, when legislatures wish to grant easy and speedy relief to towns and cities embarrassed by heavy debts. From the standpoint of the legislature, and of the city concerned, this might appear to be the only feasible method of clearing up the embarrassing complication presented by a city heavily encumbered with debts which it has no present means of paying.

But the creditor of the dissolved municipality sees the matter in a different light. When he enters into contractual relations with the city he believes that here, as in every other contingency, he is amply protected by the guarantees of life, liberty and property in the federal constitution, especially by the clause which denies to any state the right to pass a "law impairing the obligations of contracts." He believes that no state legislature is so powerful as to be able to override this clear constitutional limitation, whether directly or indirectly. This opinion seems to be based upon sound legal principles, and an attempt will be made in the following discussion to show that a nullifying law such as that described is absolutely unconstitutional and void, so far as it interferes with the rights of creditors, and that the weight of authority as shown in the decisions of the supreme court is in accord with this view. It must be acknowledged, at the outset, that this position does not seem to be supported by our greatest authority on the law of municipal corporations, Judge Dillon, who states the rule as follows:

> "If the legislature repeals the charter of the debtor corporation and dissolves it, and makes no provision for its debts, and it has no private property subject to execution, and there is no resource for the payment of such indebtedness but taxation, then if no new or successor corporation be organized, and if no instrumentalities of the taxing power remain subject to the process of the courts, the rights

> of creditors are, in fact, impaired or destroyed, and it would seem that the courts are in such case practically powerless to prevent this result; and that the creditor's only remedy, which he would be very apt under the circumstances to consider illusory, is to appeal for relief to the legislative department of the government, that is to say, to the very department that of set purpose adopted the hostile enactments that cut down and destroyed his rights and remedies."[17]

Among the cases cited in support of this statement is Meriwether *v.* Garrett.[18] Since this case is usually cited by those holding the current view of the question, it will be well to take it as a starting point, discover, if possible, what was actually decided by it, and compare it with other decisions of the supreme court. As the facts of the case are rather complicated, it will be necessary to go into some detail.

The city of Memphis being very heavily in debt, and apparently bankrupt, so to speak, the legislature of Tennessee on January 29, 1879, passed the following act:

> "Chapter 10, Act of 1879. An act to repeal the charters of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the state."

Section 3 declared that all municipal corporations within the state having a population of 35,000 or over should be abolished. Memphis was among these.

At the same time the following act was passed:

> "Chapter 11, Acts of 1879. A bill to establish taxing districts in this State, and to provide the means of local government for the same."

This law provided that in the place of the defunct municipalities there should be established taxing districts. These districts were to exercise the ordinary powers of local governments, and provision was made for the necessary officials, but the taxing power was denied them. The legislature reserved to itself the power to levy and collect taxes, and it was expressly provided

17. Dillon on Municipal Corporations, p. 250. See also, Lile's Notes on Municipal Corporations, p. 6; and Ingersoll on Public Corporations, note to p. 168.

18. 102 U. S. 472.

that no taxes so collected should be applied to the payment of debts of the abolished municipalities.

On March 13, 1879, a law was passed providing for the appointment of a back tax collector, whose duty it should be to collect the taxes levied by the defunct cities and apply the proceeds to the payment of the debts formerly contracted by them. Under this law the plaintiff in error, Minor Meriwether, was appointed back tax collector, and he qualified and proceeded to perform his duties.

In the meantime, suit had been brought against the city and certain officers by Garrett, defendant in error, and other creditors. On February 7 they had filed an amended and supplemental bill, charging "that said chapters 10 and 11 of the Acts of 1879, so far as they attempt to impair those rights [of creditors] or divert the assets of the corporation from the reach and control of the creditors are unconstitutional and void," and praying that a receiver be appointed to take charge of the fiscal affairs of the city, administer the property and pay valid debts. Among other things it was prayed that "if the present assets are not sufficient to pay all the debts, assessments be made upon all the corporators and property in the city for any claims that remain unpaid."

The court granted the relief sought, and appointed one Latham receiver, as prayed. He qualified and attempted to carry out his instructions. The two receivers interfered with each other, debtors were in a quandary as to which of them had a right to receive the taxes, and the rights of creditors were impaired. Defendant in error then brought suit to have Meriwether enjoined from interfering with the performance by Latham of the duties placed upon him by the court. The injunction was granted, and the court decreed, among other things "that all the assets and property of every description theretofore belonging to the city of Memphis, or so much thereof as may be necessary for the purpose, including taxes heretofore assessed and remaining unpaid and due the city, be applied to the payment of such debts," and further, "that all the property within the limits of the city of Memphis is liable and may be subjected to the payment of all the debts aforesaid owing by said city, and that such lia-

bility shall be enforced thereafter from time to time in such manner as the court might order and direct."

Appeal was taken to the supreme court of the United States. Mr. Chief Justice Waite announced the conclusions reached by that court, in part, as follows, giving no opinion:

> "1. Property held for public uses, such as public buildings, etc., * * * cannot be subjected to the payment of the debts of the city * * *.
>
> "2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. * * *
>
> "3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature.
>
> "4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirements of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city cannot be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes can only be collected under authority of the legislature. * * *
>
> "7. The decree of the court below is reversed."

It will be seen that the case was decided against defendant in error mainly on the ground that the receiver appointed by the lower court was invested with powers which no court has a right to confer. But as to the question of the constitutionality of the law of January 30, 1879, abolishing the municipality, withholding from the substituted city government the power of taxation, and thus impairing the obligation of contracts entered into by the former city—as to this vital question, the decision is unsatisfactory. The matter seems to have been squarely presented to the court, however, for, among the questions certified by the lower court was the following:

> "2. Whether the act [described above] * * * which act, in terms as shown therein, repealed the charter, and all laws incorporating the city of Memphis, was and is a valid law, or whether the said act is contrary to the constitution of the state of Tennessee, or to the constitution of the United States, as against creditors holding bonds and debts contracted prior to the repeal."

As the constitutional question was thus presented, and as the court did not decide the law in question to be contrary to the constitution, the current opinion is that it was decided to be in conformity with it.

In the opinion rendered by Mr. Justice Field, for himself, Mr. Justice Miller and Mr. Justice Bradley, the constitutionality of the law is discussed, but not very satisfactorily. The argument presented may be sifted down to these two propositions: First, that "there is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control;" and second, that "all persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature."

As to the first statement, it seems to be rather irrelevant—an evasion of the real question. It is not a question of the state being bound by any contract voluntarily entered into between itself and the public; it is a question of the state being bound, willingly or not, by a clear limitation imposed upon it by the constitution, the supreme law of the land, which limitation makes it unlawful for the state to pass a law impairing the remedy of a contract entered into by a municipal corporation, in its capacity as a business concern, and a private citizen.

The second argument, that the creditor is bound by notice of the transcendent power of the state legislature, when he enters into his contract, seems equally evasive and meaningless. For what is the power of the state of which he may be held to have notice? Undoubtedly its original, inherent power, as curtailed by the limitations specified in the federal constitution—nothing more; and the power of a state to abolish a municipality or do any other act is limited by the provision against impairing the obligations of contracts. The argument of the court, if logically carried out, would nullify every provision placed in the constitution for the protection of life, liberty and property. Suppose, for example, I should purchase land, and take a deed therefor, unwitnessed, the law at the time requiring no witnesses; and a year later the state should pass a law that all deeds made within the past two years should be void, unless signed by three witnesses. If I complained of this unreasonable law, could the state answer that when I took the deed I had notice of the in-

herent power of the state to make laws regulating the form and sufficiency of contracts? This answer would not stand in any court, because of the constitutional limitation that no state shall pass any law impairing the obligation of contracts. Why, then, is it less just in this case than in the one we have been discussing that the limitation in question should be overridden by the state's power? Is it not as absurd to argue in the one case as in the other that the limitation is limited by the power which it was intended to limit?

In this case Justices Strong, Swayne and Harlan dissented. Mr. Justice Clifford, who delivered the opinion in Mt. Pleasant *v.* Beckwith, from which we have quoted above, took no part in the decision. Judging by the views he expressed in the prior case, we might infer that he would have joined in the dissent.

In the course of his dissenting opinion, Mr. Justice Strong said:

> "But while the decree entered by the circuit court cannot be sustained in its full extent, I am of opinion that complainants are entitled to some of the relief granted them by the decree. If they are not, then a new way has been discovered to pay old debts. It cannot be that a corporation, whether municipal or not, can be dissolved, and that by its dissolution its property can be withdrawn from the reach of its just creditors by any process of law or equity."[19]

Again he says:

> "If ever legislation impaired the obligation of contracts, this did. If it had been simply the repeal of the municipal charter, no one could have called it in question. Undoubtedly the legislature of a state may amend or dissolve the organization of a municipal corporation, so far as its governmental powers are concerned. But no legislature can so dissolve a corporation, municipal or private, as to destroy or impair the obligation of any contracts the corporation may have made."[20]

It is interesting to note that in another case, decided by the supreme court of Tennessee, arising under the same law as Meriwether *v.* Garrett, it was held, that the taxing district created by that law was merely a continuation of the original municipal corporation under a different form, and liable for its debts, and that

19. Ibid, p. 526.
20. Ibid, p. 532.

the provision of the law denying to the new municipal government the taxing power was void, so far as the claims of creditors were prejudiced thereby. The court said:

> "And the question comes to this, can the legislature, where the corporations are substantially the same according to the terms of the charter as construed by the courts, change the legal effect of what has been done by a positive mandate that the new corporation shall not be liable for the debts of the old? If it can, it would logically follow that the legislature could prohibit a corporation from paying its own debts. It has no such power. Such a prohibition is simply void. And in this case, under the circumstances, the provision in question is amenable to the constitutional objection that it undertakes to impair the obligations of contracts."[21]

Wolff *v.* New Orleans[22] is another important case bearing upon the subject. The relator was holder of certain bonds issued by the city in exchange for railroad stock. After the issue of the bonds the legislature of Louisiana passed a law which curtailed the taxing power of the city existing at the time the bonds were issued, and in reliance upon which they were taken. The law if enforced would have postponed indefinitely the payment of both principal and interest. The court held, that the law was unconstitutional, as impairing the obligations of the contract involved. Mr. Justice Field, delivering the opinion, said:

> "It is true that the power of taxation belongs exclusively

21. O'Connor *v.* Memphis, 6 Lea (Tenn.) 730, 742. This opinion is supported also by the case of Morris & Cummings *v.* State, 62 Texas, 728. A certain town in Texas had work performed for it by Morris and Cummings, contractors, and in payment therefor granted them the right to collect certain port dues. Later the legislature repealed the charter of the town. It was contended that the repealing law abolished the right of the contractors to collect the dues, but the court held the contrary. It said.

"The power of the legislature to alter or repeal an act chartering a municipal corporation is undoubted.

"But the power cannot be exercised to the injury of creditors of such a corporation or of persons holding contracts with it, especially when fully performed on their part, so as to entitle them to the compensation provided for in the contract.

"The present repealing act must be considered in reference to the provision of the constitution of the United States forbidding the states to pass laws impairing the obligations of a contract."

22. 103 U. S. 358.

to the legislative department, and that the legislature may at any time revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement."[23]

Although expressing so clearly the limitation on the power of the legislature, Mr. Justice Field disclaims any intention of overruling Meriwether *v.* Garrett, and attempts to reconcile the decisions in the two cases by drawing what seems, so far as the rights of creditors are concerned, an imaginary distinction between them. He says:

"These views are not inconsistent with the doctrine declared by the decision of the court in the recent case of Meriwether *v.* Garrett, 102 U. S. 472. There the charter of the city of Memphis had been repealed, and the state had taken the control and custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. The city with all her officers having thus gone out of existence, there was no organization left—no machinery—upon which the courts could act by mandamus for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city.

"Here the municipal body that created the obligations upon which the judgment of the relator was recovered, existing with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the courts can act. The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed and by mandamus compel, at the instance of the parties interested, the exercise of that power as if no such legislation had ever been attempted."[24]

23. Ibid, p. 363.

24. Ibid, pp. 368, 369.

As to this statement Mr. Justice Harlan dissented. He said:

> "I concur in the opinion just delivered, except the paragraph in which reference is made to Meriwether *v.* Garrett, 102 U. S. 472. The present case does not require us to determine any question as to the effect which the repeal of a municipal charter may have upon the rights of existing creditors. Nor do I wish to be understood as assenting to the correctness of the statement in the opinion as to what was involved and decided in Meriwether *v.* Garrett."[25]

Mr. Justice Harlan seems justified in saying that it was unnecessary for Mr. Justice Field, in delivering his opinion, to drag in the involved and questionable decision in the Meriwether case. We have seen already that this case was very complicated and that it is difficult, if not impossible, to see precisely what was decided by it. Thus in a note to Dillon on Public Corporations[26] the author states that he does not understand a part of the decision; and Mr. Justice Harlan here states that Mr. Justice Field was mistaken as to what was actually decided in the case. Furthermore, the distinction which Mr. Justice Field tries to draw between the cases, by which he seeks to show that in the former case there was not a violation of the constitution while in the latter there was, vanishes when we view the matter broadly. Plainly put the distinction which he attempted to make was this: Under the constitution a state legislature has no right to impair the obligations of contracts entered into by a municipal corporation by diminishing or abolishing the tax power which existed at the inception of those contracts, so long as the municipal corporation remains in existence; but it has a right to impair such contracts if at the same time that it abolishes the tax power of the municipal corporation, and by the same act, it abolishes the corporation itself. This does not seem reasonable.

The limitations placed in the constitution for the proper curbing of governmental power, national and state, and for the preservation of civil liberty are rightly considered as among its most important provisions, and surely cases arising under them should be treated in a broad and liberal spirit, as free as possible from hair-splitting distinctions. For in these cases we are not considering such technical matters as, for example, the rules and

25. Ibid, p. 369.
26. 4th Ed., p. 248.

methods of common-law pleading, but we are discussing questions of civil liberty, and we should ever bear in mind the fact that the insurance of individual rights is the primary object of every system of free government; that the government is made for the governed, and not the governed for the government. From what standpoint, then, should we view this question—from that of the state government, or of the municipality, or from that of the individuals who contract with the municipality? Without doubt from the standpoint of the last, since the limitation was placed in the constitution expressly for the protection of individual rights. Taking this view, what difference does it make whether the tax power is diminished or taken away from a municipality which remains in existence or whether it is abolished by the extinction of the municipality itself. In both instances the obligation of the individual's contract is impaired, and if there is any difference at all, it is that the impairment is more absolute in the latter case than in the former.

In this connection attention is called to the language of the supreme court, in Mt. Pleasant *v.* Beckwith,[27] where it was said that "unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the constitution forbids (that), the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town," etc. This statement of the law is clear enough. It was not a mere dictum of the judge, moreover, as it was a question at issue, brought out by counsel for the new town, whether the abolishment of the old municipality could be held, under the constitution, to work a nullification of its debts. As we have seen, the court said it could not, and it is strange that the same court in the Meriwether case seemed to overlook this.

From the foregoing examination of the decisions it is believed to be the law that a state legislature cannot, under the constitution, abolish a municipal corporation without either making adequate provision for the payment of its debts, or else creating another municipality in its place.[28]

27. 100 U. S. 514.

28. In the recent case of Graham *v.* Folsom, decided by the supreme court January 8, 1806, the facts were as follows: Township Ninety-six, being a part of Abbeville county, South Carolina, with the authority

III. Where the Original Municipality Remains in Existence, but a Part of Its Territory and Population Is Taken Away and Formed into a New Municipal Corporation.

The law in regard to the rights and obligations of the original town and of the new town, in such a case as this, is stated as follows in Mt. Pleasant *v.* Beckwith:[29]

> "Where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, it is settled law that the old corporation retains all the public property not included within the limits of the new municipality,

of the legislature, issued certain bonds to aid in the construction of a railroad. Later, in 1896, the county of Greenwood was organized out of portions of Abbeville and Edgefield counties, and Township Ninety-six was included in it. In 1903 a law was passed abolishing certain municipalities, among them the township in question. Defendant in error brought mandamus proceedings to compel plaintiffs in error, the auditor and treasurer, of Greenwood county, to assess and collect taxes to pay a judgment recovered against Township Ninety-six on certain of the above-mentioned bonds. Judgment was awarded in favor of the holder of the bonds, and, on appeal to the supreme court, the decision was affirmed. The court held, that the abolishing of the township could not, under the constitution, be held to abolish the debt, and that according to the provisions of a certain statute, the plaintiffs in error had authority, and could be compelled, to levy and collect taxes upon the property of the defunct municipality and pay the debts thereof. In the course of the opinion the court spoke as follows:

"The power of the state to alter or destroy its corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships, or the change of the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the state, but they will not ignore the effect of the action. * * *

"And this is not a limitation, as plaintiffs in error seem to think it is, of the legislative power over municipalities, either over their change or destruction. It only prevents the exercise of that power being used to defeat contracts previously entered into."

29. Supra, p. 528.

and is liable for all the debts contracted by her before the act of separation."[30]

Laramie Co. *v.* Albany Co.[31] is a case in point. Here a part of a county was cut off and formed into a new county, no provision being made by the legislature for the settlement of antecedent debts. Judgment was obtained against the old county for these debts by creditors, and this suit was brought by her against the new county for contribution. The supreme court, after stating that legislatures may divide counties as they please, and, in so doing, apportion rights and obligations, provided private rights are not thereby violated, spoke as follows:

> "Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay without any claim for contribution."[32]

The court seemed to realize that its decision was harsh and unreasonable, and the following admission was made:

> "Hardships may be suffered by the corporation from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished."

Although the view expressed in the foregoing cases appear, to be upheld by good authority, and is commonly accepted as the law, it appears to be not only unjust to both the creditor and the original municipality, but diametrically opposed to well-estab lished theories in respect to the nature of municipal corporations On what theory these cases are based—whether on the ground that the new municipality was not in existence when the debts were contracted, and, therefore, could not be bound by the contracts, or that the legislature had full power to apportion the indebtedness and that its failure to do so meant that it intended the old corporation to remain solely liable—the writer has not

30. Citing Town of Dupree and others *v.* Town of Bellevue and others, 31 Wis. 120, 125.

31. 92 U. S. 307.

32. Ibid, p. 315.

been able to discover, since the courts and the text writers merely state the supposed rule of law without giving reasons. In only one of the decisions examined is there a hint as to what appears to be the proper solution of the question. In O'Connor *v.* City of Memphis,[33] the court says:

> "As long as the old corporation continues to exist, although shorn of its proportions, the creditor may, and according to some authorities, must look exclusively to it.[34] A qualification of the latter part of the rule may be assumed, although the point seems never to have arisen in judgment, where the municipality has been so reduced in population, and territory as to be unable to meet the liabilities."

Suppose, for example, I purchase bonds of the town of X which has a population of 10,000 and taxable property valued at $1,000,000. Suppose later on the legislature takes away nine-tenths of the population and taxable property of X and forms from it the town of Y. Is it possible that my only remedy on the bonds is against X, the diminished municipality, and if I am able to recover on the contract against X, is it reasonable that she should have no contribution from Y? Surely, either case would be very unjust. In the one the satisfaction of my contract might be indefinitely postponed; in the other the taxpayers of the old corporation would be made to suffer unjustly.

When one takes the bonds of a municipal corporation, upon what security does he rely ultimately for payment? Plainly, upon the rent-producing property and tax-paying population. Is it possible, then, that, under the constitution, the great bulk of the property and population can be taken away from the original corporation and thus relieved from all future taxation for the satisfaction of her debts? Would not this amount to a very serious impairing of the obligations of contracts?

The fault in this theory is that it is based on a false conception of the real nature of a municipal corporation; it mistakes the raiment with which the legislature has invested the municipality for the living body; it looks upon the legal fiction only and ignores the substantial constituents, population and territory.

It seems then, that, considering the true nature of municipal

33. 6 Lea (Tenn.) 730.

34. Citing Howard *v.* Horner, 11 Hun 532; Laramie Co. *v.* Albany Co., 92 U. S. 307.

corporations, the just and reasonable rule in such a case as this would be to hold the new municipality liable for a part of the debts of the old, proportionate to the population and taxable property taken by it from the latter. For when the division is made, there are really two new corporations created out of the body of the old one; they are both successors of the old municipality, and the mere fact that one retains the original name should not make it solely liable for the antecedent debts. It is believed that this view is fully supported by the decision in the case of Mt. Pleasant *v.* Beckwith in spite of the dictum to the contrary in the opinion in that case.

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